SUBSTANCE AND PROCEDURE: THE SCOPE OF JUDICIAL RULE MAKING AUTHORITY IN OHIO

I. INTRODUCTION

In 1933 and 1934 the United States Congress enacted legislation granting the United States Supreme Court power to make rules governing procedure in civil cases[1] and in criminal appeals.[2] In 1934 the United States Supreme Court promulgated rules of criminal procedure after a plea of guilty or verdict or finding of guilt.[3] In 1937 the Court issued the Federal Rules of Civil Procedure to govern the manner of litigation in civil cases in federal courts.[4] After receiving statutory authorization,[5] the United States Supreme Court issued the Federal Rules of Criminal Procedure in 1944.[6] Many states followed the federal example, granting state supreme courts authority to make procedural rules for all state courts.[7] Many state courts then promulgated procedural rules patterned after the federal rules.[8]

Ohio, however, was not immediately responsive to the trend of granting courts rule making authority.[9] But with the adoption in 1968 of the Modern Courts Amendments to the Ohio Constitution,[10] the Ohio Supreme Court was granted rule making power to regulate procedure within the state court system. Article IV, § 5 (B) of the Ohio Constitution now provides in part:

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[1] Federal Enabling Act ch. 651, §§ 1-2, 48 Stat. 1064 (1934), *as amended*, 28 U.S.C. 2072 (1970) [hereinafter cited as Federal Enabling Act], set out in note 11 *infra*.

[2] Act of Feb. 24, 1933, ch. 119, §§ 1-3, 47 Stat. 904, *as amended*, 18 U.S.C. § 3772 (1970).

[3] 292 U.S. 659 (1934).

[4] 308 U.S. 645 (1940).

[5] Act of June 29, 1940, ch. 445, 54 Stat. 688, *as amended*, 18 U.S.C. § 3771 (1970).

[6] 327 U.S. 821 (1947).

[7] Harris, *The Rule-Making Power*, 2 F.R.D. 67, 68-73 (1943); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 625 (1957).

[8] Clark, *The Federal Rules of Civil Procedure 1938-1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435 (1958). Clark lists fifteen jurisdictions as having adopted the Federal Civil Rules "fully" and fourteen more as having adopted "substantial portions" of the Federal Civil Rules. *See also* Milligan & Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST. L.J. 811, 830 (1968).

[9] *See* Milligan & Pohlman, *supra* note 8, at 828-31. Ohio by statute adopted some of the procedural changes incorporated in the federal rules.

[10] 132 pt. II Ohio Laws 2878 (1967). Amended Substitute House Joint Resolution 42 (107th General Assembly) proposed amending Article IV, §§ 1 & 2, repealing Article IV, §§ 3, 4, 7, 8, 10, 12, & 14 and Article II, §§ 12 & 13; and enacting Article IV, §§ 3, 4, 5, & 6.

> The supreme court shall prescribe rules governing practice and procedure, in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

This constitutional provision granting the Ohio Supreme Court rule making authority is very similar to the Federal Enabling Act adopted by the Congress granting the United States Supreme Court rule making authority in civil cases.[11] Since 1968, the Ohio Supreme Court has issued rules governing civil procedure,[12] criminal procedure,[13] and appellate procedure,[14] all patterned after the corresponding federal rules.[15]

In Ohio, as in the federal system, the validity of a court promulgated rule may turn on the distinction between "substance" and "procedure," since the court is allowed to regulate procedure but is not allowed to abridge, enlarge, or modify any substantive right.[16] If, for example, the Ohio Supreme Court, in a case involving the validity of an Ohio rule, decided that the rule abridged a "substantive right," then the rule would have to be declared invalid since it exceeded the court's rule making authority.[17] However, court promulgated rules have a great presumption of validity.[18] In both Ohio and the federal

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[11] The Federal Enabling Act stated in part:

> [T]he Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgations, and thereafter all laws in conflict therewith shall be of no further force or effect.

[12] 22 Ohio St. 2d xvii (1970).

[13] 34 Ohio St. 2d xix (1973).

[14] 26 Ohio App. 2d xvii (1971).

[15] For civil rules, see J. MCCORMAC, OHIO CIVIL RULES PRACTICE iii (1970). For criminal rules, *see* 1 K. APLIN ET AL., ANDERSON'S OHIO CRIMINAL PRACTICE AND PROCEDURE § 1.1 (1975); 2 O. SCHROEDER & L. KATZ, OHIO CRIMINAL LAW AND PRACTICE, 117-297 (1974). For appellate rules, see T. KOYKKA, OHIO APPELLATE PROCESS § 3.05 (1972); A. WHITESIDE, OHIO APPELLATE PRACTICE, Preface (1972).

[16] *See* Sibbach v. Wilson & Co., 312 U.S. 1 (1941); State v. Hughes, 41 Ohio St. 2d 208, 324 N.E.2d 731 (1975); State *ex rel.* Safeco Ins. Co. v. Kornowski, 40 Ohio St. 2d 20, 317 N.E. 2d 920 (1974).

[17] *See, e.g.* State v. Hughes, 41 Ohio St. 2d 208, 324 N.E.2d 731 (1975); *cf.* Perry v. Allen, 239 F.2d 107 (5th Cir. 1956).

[18] *See* H.F.G. Co. v. Pioneer Publishing Co., 162 F.2d 536, 539 (7th Cir. 1947) in which the court states that

> we are of the view that a strong presumption exists that the Supreme Court in

system, the rules were drafted by an advisory committee, issued by the Ohio Supreme Court or the United States Supreme Court, and passed upon by the Ohio General Assembly or the Congress. This process gives court promulgated rules prima facie validity as being within the scope of the judicial rule making power.[19]

In discussing the substantive-procedural distinction, there is a tendency to portray both "substance" and "procedure" as clearly defined categories which are mutually exclusive. However, such a portrayal is inaccurate:[20] what is "substance" and what is "procedure" may vary depending on the purpose for making the distinction.[21] What is "procedural" for purposes of federal diversity jurisdiction or for conflicts of laws may not be "procedural" for purposes of determining the validity of a court promulgated rule.[22] The Ohio Supreme Court recognized this chameleon-like quality in *Gregory v. Flowers*.[23] In attempting to use the substantive-procedural distinction to define the scope of permissible retroactive laws the court observed that " '[s]ubstantive' and 'procedure' are the same key words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used."[24]

It has been contended that such nebulous concepts as "substance" and "procedure" result in an illusory distinction[25] and that the terms should be abandoned.[26] But since both the Ohio and federal

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prescribing the rules acted within the power delegated to it by Congress, and that the court and Congress, as well as others who labored in connection therewith, thought that the rule in question was one of procedure and that its adoption would not affect the substantive rights of the litigant. Furthermore, we think that the determination as to whether a mistake has been made in this respect can more appropriately be made by the Supreme Court, which is given power to amend.

See also Helms v. Richmond-Petersburg Turnpike Authority, 52 F.R.D. 530 (E.D. Va. 1971).

[19] *See* J. McCORMAC, OHIO CIVIL RULES PRACTICE § 1.02, at 4 (1970).

[20] Joiner & Miller, *supra* note 7, at 635; Levin & Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 14-15 (1959).

[21] *See* W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICTS OF LAWS 163-67 (1949).

[22] *Id.*

[23] 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972).

[24] *Id.* at 57 n.9, 290 N.E.2d at 187 n.9, quoting Frankfurter, J., in Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

[25] 1 C. CHAMBERLAYNE, EVIDENCE § 171 at 217 (1911) cited in W. COOK, *supra* note 21, at 158 n.10.

[26] Riedl, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?* 26 A.B.A.J. 601, 604 (1940). *See also* Note, *The Rulemaking Power of the Florida Supreme Court: The Twilight Zone Between Substance and Procedure*, 24 U. FLA. L. REV. 87, 100 (1971).

courts have continued to use this distinction as the test for determining the validity of court promulgated rules[27] (as well as for other purposes),[28] the concepts of "substance" and "procedure" must be examined and defined as clearly as possible.[29] In this discussion, an understanding of the substantive-procedural distinction is sought only for the purpose of determining the validity of a court made rule.

No specific formula or definition exists which would clearly delineate between "substance" and "procedure" in every case.[30] It may be more realistic to visualize some things being classified as "substantive," some as "procedural," and some as falling into a "twilight zone."[31] A difference in the definition of "substance" and "procedure" could lead to a difference in the outcome of cases, but it should also be noted that courts in different jurisdictions using the same definition of "substance" and "procedure" may arrive at different results in similar cases.[32]

The importance of the substantive-procedural distinction in Ohio has been illustrated in the recent case of *State v. Hughes*.[33] There the Ohio Supreme Court relied on the substantive-procedural distinction in Article IV, § 5 (B) of the Ohio Constitution to declare part of a court promulgated rule invalid. A portion of Ohio Appellate Rule 4 (B) was held to exceed the court's rule making authority. Since it was granted rule making authority in 1968, the Ohio Supreme Court has promulgated five sets of rules governing procedure in the courts of Ohio.[34] *Hughes* is apparently the first case where any rule

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[27] *See* note 16 *supra*.

[28] *See* W. COOK, *supra* note 21.

[29] *See* Levin & Amsterdam, *supra* note 20, at 15, 20.

[30] Southwest Underwriters v. Montoya, 80 N.M. 107, 109, 452 P.2d 176, 178 (1969); Curd, *Substance and Procedure in Rule Making*, 51 W. VA. L.Q. 34, 45 (1948).

[31] Note, *The Rulemaking Power of the Florida Supreme Court: The Twilight Zone Between Substance and Procedure*, 24 U. FLA. L. REV. 87 (1971).

[32] *See* State v. Hughes, 41 Ohio St. 2d 208, 324 N.E.2d 731 (1975); State v. Birmingham, 95 Ariz. 310, 390 P.2d 103, *modified*, 96 Ariz. 109, 392 P.2d 775 (1964), both discussed in text *infra*. The definition of substance and procedure need not be the same in every jurisdiction. In states where the legislature plays a role in the rule making process, "procedure" could be defined more broadly to include a wider range of subjects. In jurisdictions where the legislature plays no role in the rule making process and cannot invalidate rules, "procedure" could be defined more narrowly to include a smaller range of subjects. *See* Note, *The Rule-Making Powers of the Illinois Supreme Court*, 1965 U. ILL. L.F. 903, 904-5 (1965).

[33] 41 Ohio St. 2d 208, 324 N.E.2d 731 (1975).

[34] OHIO RULES OF CIVIL PROCEDURE, 22 Ohio St. 2d xvii (1970); OHIO RULES OF APPELLATE PROCEDURE, 26 Ohio App. 2d xvii (1971); OHIO RULES OF JUVENILE PROCEDURE, 30 Ohio St. 2d xix (1972); OHIO RULES OF CRIMINAL PROCEDURE, 34 Ohio St. 2d xix (1973); OHIO COURT OF CLAIMS RULES, 42 Ohio St. 2d xxv (1975). OHIO TRAFFIC RULES, 40 Ohio St. 2d

so issued has been invalidated.

This note will place *Hughes* within the context of previous Ohio cases concerning the validity of court promulgated rules. *Hughes* will be used as a vehicle for understanding the limits of the court's rule making power, and will be compared with prior Ohio and federal cases defining "substance" and "procedure" in a search for consistency in definition and result. The Ohio experience in *Hughes* will be compared with the judicial approaches in Florida and Arizona. Both of these states use the substantive-procedural distinction to define the limits of the court's rule making authority,[35] and both have procedural rules based in large part upon the Federal Rules of Civil Procedure,[36] as does Ohio.[37] Florida has held that the right of appeal was substantive and that a court rule changing the right of appeal to a discretionary one was invalid. Arizona also held that the right of appeal was substantive, but stated that the manner in which an appeal can be taken was procedural.

An alternative basis for the decision in *Hughes* is that Ohio Appellate Rule 4 (B) unconstitutionally expanded the jurisdiction of the court of appeals. Pursuant to Article IV, § 3 (B) of the Ohio Constitution, the jurisdiction of the courts of appeals is within the exclusive province of the legislature. The effect of the *Hughes* decision on other rules will be examined. Finally, the scope of the Ohio Supreme Court's rule making authority will be analyzed and compared with the role of the Ohio General Assembly in regulating judicial procedure.

II. THE VALIDITY OF COURT MADE RULES: "SUBSTANCE" AND "PROCEDURE" IN DIFFERENT JURISDICTIONS

A. Hughes *and the Ohio Experience*

James Hughes was arrested in Green Township by an off-duty

xvii (1975), were promulgated pursuant to authority granted by OHIO REV. CODE ANN. §§ 2935.17 and 2937.46 (Page 1975).

[35] For Arizona, *see* State v. Birmingham, 95 Ariz. 310, 390 P.2d 103, *modified*, 96 Ariz. 109, 392 P.2d 775 (1964); Heat Pump Equip. Co. v. Glen Alden Corp., 93 Ariz. 361, 380 P.2d 1016 (1963). For Florida, *see In re* Florida Rules of Criminal Procedure, 272 So. 2d 65 (1973) (concurring opinion); State v. Garcia, 229 So. 2d 236 (1969); State v. Furen, 118 So. 2d 6 (1960); *In re* Petition of Florida State Bar Ass'n for Promulgation of New Fla. R. Civ. Proc., 145 Fla. 223, 199 So. 57 (1940); Note, *The Rulemaking Power of the Florida Supreme Court: The Twilight Zone Between Substance and Procedure*, 24 U. FLA. L. REV. 87 (1971); Nash, *Florida Appeal Times*, 16 U. MIAMI L. REV. 24, 39-43 (1961).

[36] *See* Clark, *supra* note 8.

[37] *See* note 15 *supra*.

Delphi Township police officer. Hughes refused to submit to the arrest and was charged with resisting arrest and assault on a law enforcement officer. The Hamilton County Municipal Court granted Hughes' motion to quash the warrants on the grounds that the officer was beyond his jurisdiction when the arrest was made and the officer did not have a warrant. The prosecution filed a notice of appeal but the appeal was dismissed for failure to seek permission from the court of appeals to file a bill of exceptions as required by Revised Code § 2945.68.[38] The prosecution appealed this dismissal to the Ohio Supreme Court, contending that § 2945.68 was superseded by Ohio Appellate Rule 4 (B),[39] which grants the prosecution an appeal as of right, requiring only that a notice of appeal be filed.

The prosecution argued that §§ 2945.68 and 2945.70 were procedural in nature and, since they were in conflict with a court promulgated rule, were superseded by the rule. The prosecution contended that § 2945.70[40] was the sole source of the state's right to appeal.[41]

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[38] OHIO REV. CODE ANN. § 2945.68 (Page 1975) states:

The prosecuting attorney, solicitor, or the attorney general may present a bill of exceptions in a criminal action to the court of appeals or the supreme court and apply for permission to file it with the clerk of the court for the decision of such court upon the points presented therein. Prior thereto, he shall give reasonable notice to the judge who presided at the trial in which such bill was taken, of his purpose to make such application. If the court of appeals or the supreme court allows the bill to be filed, the prosecuting attorney, solicitor, or attorney general shall, within ten days of the filing of the bill, file his brief in support of such exceptions and forthwith serve a copy thereof upon the trial judge and any attorney appointed by the judge to argue the exceptions against the prosecuting attorney, solicitor, or the attorney general.

[39] The pertinent part of Ohio Appellate Rule 4 (B) states:

APPEAL AS OF RIGHT—WHEN TAKEN

(B) Appeals in criminal cases. . . In an appeal by the prosecution, the notice of appeal shall be filed in the trial court within thirty days of the date of the entry of the judgment or order appealed from; provided that in appeals under Criminal Rule 12(J) and Juvenile Rule 22(F) the notice of appeal shall be filed with the clerk of the trial court within seven days of the date of the entry of the judgment or order appealed from . . . .

[40] OHIO REV. CODE ANN. § 2945.70 (Page 1975) reads as follows:

If the court of appeals or the supreme court is of the opinion that the questions presented by a bill of exceptions should be decided, it shall allow the bill of exceptions to be filed and render a decision thereon. This decision shall not affect the judgment of the trial court in said cause, nor shall said judgment of the trial court be reversed, unless the judgment of the court of appeals or the supreme court reverses the judgment of the trial court on its ruling on a motion to quash, a plea in abatement, a demurrer, a motion to suppress evidence, or a motion in arrest of judgment. In all other cases the decision of the court of appeals or the supreme court shall determine the law to govern in a similar case.

[41] Brief for Appellant at 2, State v. Hughes, 41 Ohio St. 2d 208 (1975).

The last sentence of § 2945.70[42] was designed to allow courts of appeals to give opinions which would govern only in future cases. This part of the statute allowing opinions on moot questions was declared unconstitutional in *City of Euclid v. Heaton*[43] since it exceeded the constitutional grant of jurisdictional authority to the court of appeals.[44] The prosecution reasoned that since the part of § 2945.70 allowing advisory opinions was rendered unconstitutional, the remainder of §§ 2945.68 and 2945.70, argued by the prosecution to merely implement the last sentence by allowing the courts to screen which appeals they will hear, should be discarded also.[45] The prosecution further reasoned that since §§ 2945.68 and 2945.70 were the procedural devices for implementing the appeal and were in conflict with Ohio Appellate Rule 4 (B), the rule superceded the statute. Article IV, § 5 (B) of the Ohio Constitution provides that "[a]ll laws in conflict with such [court promulgated] rules shall be of no further force or effect after such rules have taken effect."

The court in *Hughes* rejected the prosecution's argument that § 2945.68 was procedural and held that the statute created a substantive right of appeal for the prosecution.[46] Since the statute was substantive, Ohio Appellate Rule 4 (B), which was in conflict, acted to abridge or enlarge a substantive right and was invalid as exceeding the Ohio Supreme Court's rule making authority.[47]

In an earlier decision, *Krause v. State*,[48] the Ohio Supreme Court dealt with the meaning of "substantive right" as used in Article IV, § 5 (B) of the Ohio Constitution.[49] The court said "substantive" is used in "contradistinction to the words 'adjective' or 'procedural' which pertain to the method of enforcing rights or obtaining redress."[50] The court went on to define "substantive" as "that body of law which creates, defines and regulates the rights of the parties. (See

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[42] The last sentence of OHIO REV. CODE ANN. § 2945.70 (Page 1975) reads as follows: "In all other cases the decision of the court of appeals or the supreme court shall determine the law to govern in a similar case."

[43] 15 Ohio St. 2d 65, 238 N.E.2d 790 (1968).

[44] OHIO CONST. art. IV, § 3.

[45] Brief of Appellant at 3-4, which states in part: "As that entire part of Section 2945.70 has been declared unconstitutional, the screening procedure must also be discarded as obsolete baggage."

[46] 41 Ohio St. 2d 208, 209-10, 324 N.E.2d 731, 732-33 (1975).

[47] *Id.* at 211; 324 N.E.2d at 733.

[48] 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972).

[49] OHIO CONST. art. IV, § 5 (B) is set out in the text *supra* following note 10.

[50] Krause v. State, 31 Ohio St. 2d 132, 145, 285 N.E.2d 736, 744 (1972).

Black's Law Dictionary.) The word substantive refers to common law, statutory and constitutionally recognized rights."[51]

The majority in *Hughes* did not cite to *Krause* or any other judicial precedent for a definition of "substantive right." Indeed, the court seemed to be stating a conclusion without offering any explanation. The court simply said:

> R.C. 2945.68, however, grants the prosecution a substantive right of appeal which did not exist at common law prior to the adoption of . . . Section 3 of Article IV . . ., and the implementing legislation contained in R.C. 2945.67 through 2945.70. . . .
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> The effect of R.C. 2945.67 through 2945.70 is to grant jurisdiction to appellate courts to hear appeals by the prosecution in criminal cases and to create a *substantive* right in the prosecution to bring such appeals . . . .[52]

Justice Herbert, in his dissenting opinion, said that the court did not follow the definition of substantive right found in *Krause*: "the provisions of R.C. 2945.68 do not create, define or regulate the rights of any party."[53] The dissent said that although the statute does "represent a legislative effort to describe certain procedural 'rights', which purport to pertain to the Court of Appeals and the Supreme Court . . . I find no substantive right of any party" affected by the statute.[54] Justice Herbert questioned whether the majority was prepared to strike down the thirty-day filing time for notice of appeal in civil cases found in Appellate Rule 4 (A)[55] since it "enlarged" the twenty-day filing time previously permitted by statute.[56]

Justice Herbert's question was answered quickly when the Ohio Supreme Court rendered its decision in *State v. Wallace*.[57] Again confronted with the issue it faced in *Hughes*, the court reaffirmed its opinion in *Hughes*, saying that "[s]ubstantively, the right [of the state to appeal in a criminal case] does not exist except upon the allowance

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[51] *Id.* The Ohio Supreme Court is not the only court to refer to Black's Law Dictionary for a definition of "substantive". *See* Schultz v. Gosselink, 148 N.W.2d 434, 436 (Iowa 1967).

[52] State v. Hughes, 41 Ohio St. 2d 208, 210-211, 324 N.E.2d 731, 733 (1975) (emphasis in original).

[53] *Id.* at 211, 324 N.E.2d at 734.

[54] *Id.* at 211-12, 324 N.E.2d at 734.

[55] Ohio Appellate Rule 4 (A) states in pertinent part: "In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. . . ."

[56] State v. Hughes, 41 Ohio St. 2d 208, 212, 324 N.E.2d 731, 734 (1975).

[57] 43 Ohio St. 2d 1, 330 N.E.2d 697 (1975).

of leave to appeal by the appellate court."[58] The court then held that the motion for leave to appeal by the state in a criminal case was governed by the procedural requirements of Appellate Rule 5[59] and the time requirements of Appellate Rule 4 (B).[60] The court said that "[f]airness demands that a motion by the state for leave to appeal be filed within a reasonable time after the entry of judgment or the order appealed from. Because the time limits in App. R. 4 (B) meet that objective, we make them applicable to such appeals."[61] It appears, in answer to Justice Herbert's question, that the court was not prepared to strike down the many alterations from statutory filing times made by the rules as an unconstitutional enlargement of the right to appeal.

Although the majority in *Hughes* did not cite any case law to support its decision, at least two Ohio appellate courts had previously considered cases which were relevent to the question in *Hughes*. In *Columbus v. Youngquist*,[62] the Franklin County Court of Appeals had directly faced the *Hughes* issue: whether Revised Code § 2945.68, requiring the permission of the court of appeals to file an appeal, was superseded by the Ohio Appellate Rules, allowing an appeal as of right. In *Youngquist*, the court held that § 2945.68 was procedural in nature and was superseded by the Ohio Appellate Rules.[63] The court closely examined the Ohio Appellate Rules to insure that a conflict existed between the rules and the statute.[64] However, no explanation was given as to why the statute was procedural in nature.

[58] *Id.* at 2; 350 N.E.2d at 698.

[59] The court said in State v. Wallace, 43 Ohio St. 2d 1, 3, 330 N.E.2d 697, 698 (1975), that Appellate Rule 5, when applied to appeals by the prosecution, may properly be restated to read:

> [In an appeal by the state in a criminal case,] a motion for leave to appeal shall be filed with the Court of Appeals . . . setting forth the errors which the movant claims to have occurred in the proceedings of the trial court. The motions shall be accompanied by affidavits, or by such part of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by Rule 3 and file a copy of the notice of appeal in the Court of Appeals. The movant shall also furnish a copy of his motion and a copy of the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the [defendant], who may, within thirty days from the filing of the motion, file such affidavits, parts of the record and brief or memorandum of law to refute the claims of the movant [brackets and omissions by court].

[60] Appellate Rule 4 (B) is set out in note 39 *supra*.

[61] State v. Wallace, 43 Ohio St. 2d 1, 3-4, 330 N.E.2d 697, 699 (1975).

[62] 33 Ohio App. 2d 317, 294 N.E.2d 910 (1972).

[63] *Id.*

[64] *Id.* at 319-20; 294 N.E.2d at 912.

The Court of Appeals for Hamilton County in *Hughes* distinguished *Youngquist* on the facts. The court held that the *Youngquist* language saying that Ohio Appellate Rule 4 (B) controlled over § 2945.68 was dicta, since both a notice of appeal and an application to file a bill of exceptions were filed in *Youngquist*.[65] The court also stated that the *Youngquist* decision was purely interlocutory and not a "final judgment." *Hughes* was not in conflict with the judgment in *Youngquist* since the *Youngquist* decision was not a "judgment."[66]

In *Moore v. Van Wert Propane, Inc.*,[67] the Court of Appeals for Van Wert County discussed the jurisdiction of a court to hear an appeal from a decision by the Ohio Industrial Commission. In its discussion, the court labeled the right of appeal a substantive right, although no explanation was given.[68]

B. *The Federal Experience*

The result reached by the court in *Hughes* may have been different if the case had been tried in the federal court system. In *Sibbach v. Wilson & Co.*,[69] the United States Supreme Court addressed the issue of whether Rule 35[70] of the Federal Rules of Civil Procedure violated the Federal Enabling Act.[71] The petitioner argued that "substantive rights" means "important" or "substantial" rights and that even a *procedural* rule abridging, enlarging, or modifying a substantial right should be invalidated.[72] The Court rejected this argument, saying the test for the validity of a federal rule is whether it regulates "substance" or "procedure". The Court defined procedure as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard

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[65] State v. Hughes, Nos. C73151, 73152 (1st App. Dist. Nov. 1973) at 2.

[66] *Id.* at 1.

[67] 34 Ohio App. 2d 187, 297 N.E.2d 548 (1973).

[68] *Id.* at 188, 297 N.E.2d at 549.

[69] 312 U.S. 1 (1941).

[70] FED. R. CIV. P. 35 at that time stated in pertinent part:

> In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

[71] Federal Enabling Act ch. 651, 48 Stat. 1064 (1934), *as amended*, 28 U.S.C. 2072 (1970), set out in note 11 *supra*.

[72] Sibbach v. Wilson & Co., 312 U.S. 1, 11 (1941).

or infraction of them."[73] The Court implied that "substantive right" referred to the cause of action sued upon—in *Sibbach*, the right "not to be injured in one's person by another's negligence. . . ."[74]

The Supreme Court again discussed the distinction between substantive and procedural rights in *Mississippi Publishing Corp. v. Murphree*.[75] Although most alterations of procedure do affect the rights of the litigants, the Court said such incidental effects are not what is meant by "substantive right" as used in the Federal Enabling Act.[76] The Court held that although Federal Rule of Civil Procedure 4 (f),[77] allowing service of process anywhere within a state, would affect petitioner's rights, it "does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights."[78]

In 1965 in *Hanna v. Plumer*,[79] the United States Supreme Court reaffirmed that the *Sibbach* test was to be applied under the Federal Enabling Act to distinguish between substance and procedure and, thus, to decide the validity of any federal rule. "[I]n cases adjudicating the validity of Federal Rules, we . . . have to this day continued to decide questions concerning the scope of the Enabling Act and the constitutionality of specific Federal Rules in light of the distinction set forth in *Sibbach*."[80]

The federal and Ohio definitions of substance and procedure are similar, yet the results of their application have been different. *Hughes* held part of Ohio Appellate Rule 4 (B) invalid, but Federal Appellate Rule 4 (B)[81] which provides a similar procedure,[82] still has

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[73] *Id.* at 14.

[74] *Id.* at 13.

[75] 326 U.S. 438 (1946).

[76] *Id.* at 445.

[77] The relevant portion of Federal Rule of Civil Procedure 4(f) reads as follows: "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held. . . ."

[78] Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 446 (1945).

[79] 380 U.S. 460 (1965).

[80] *Id.* at 470-71.

[81] Federal Appellate Rule 4(b) states in relevant part:

APPEAL AS OF RIGHT—WHEN TAKEN

(b) Appeals in Criminal Cases. . . . When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket.

Appeals by the government are authorized by statute from decisions dismissing one or

the presumption of validity.

The Fifth Circuit Court of Appeals, when confronted with a situation analogous to *Hughes*, reached a result opposite to that of the Ohio court. In *Semel v. United States*,[83] the federal appellate court held that Federal Criminal Rule 37 (a)(1),[84] allowing an appeal as of right and abolishing petitions for allowance of appeal, controlled over a statute[85] which gave the appellate court control over the allowance of an appeal. The conflict between the statute and the rule was established[86] but there was no discussion of the substantive-procedural distinction. The court without explanation concluded that if the statute and rule are in conflict, the rule controls. No mention was made of such a change affecting the jurisdiction of the court of appeals.[87]

C. *The Florida and Arizona Approaches*

Courts in Florida and Arizona have decided the validity of court promulgated rules by looking to the substantive-procedural distinction. In *State v. Furen*,[88] the Florida Supreme Court confronted the mirror image of the issue in *Hughes*. *Furen* involved a conflict between a statutory grant of appeal as a matter of right[89] and a court

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more counts in an indictment or information and from decisions suppressing or excluding evidence or requiring the return of seized property. 18 U.S.C. 3731 (1970).

[82] *See* 6 W. MILLIGAN, OHIO FORMS OF PLEADING AND PRACTICE CA4-3, 4-6 (1975).

[83] 158 F.2d 229 (5th Cir. 1946).

[84] Federal Criminal Rule 37(a)(1) is now incorporated within Federal Appellate Rule 3. At the time of *Semel*, Federal Criminal Rule 37(a)(1) read in pertinent part:

> An appeal permitted by law from a district court to the Supreme Court or to a circuit court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished.

[85] Act of March 3, 1911, ch. 231, § 132, 36 Stat. 1134 which provides:

> Any judge of a circuit court of appeals, in respect of cases brought or to be brought before that court, shall have the same powers and duties as to allowances of appeals and the conditions of such allowances as by law belong to the justices or judges in respect of other courts of the United States, respectively.

The Committee Notes to the Federal Rules of Civil Procedure as issued in 1938 state that Rule 73 is intended to supersede this statute.

[86] Semel v. United States, 158 F.2d 229, 230 (5th Cir. 1946).

[87] For a discussion of how the Ohio court viewed the issue of modifying jurisdiction in the *Hughes* decision, see text *infra* beginning at note 103.

[88] 118 So. 2d 6 (Fla. 1960).

[89] Laws of Florida 1947 ch. 24090, § 9, at 1028, which reads in pertinent part:

> The defendant may appeal from a final order of the [real estate] commission to the circuit court of the county from which he applied for registration, if an applicant,

rule making all such appeals discretionary.[90] The court relied on a definition of "practice" used by the English Court of Appeal in 1881:

> "Practice," in its larger sense . . . like "procedure" . . . denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines that right, and which by means of the proceeding the Court is to administer,—the machinery as distinguished from its product.[91]

In applying its definition, the Florida court held that the distinction between appeal as of right and appeal on leave of court is more than a difference in form.[92] The court concluded that the rule was more than procedural: "The rule exceeds the scope of 'practice and procedure,' is legislative in character and must yield to the provisions of the statute. The substantive rights under the statute are greater than under the rule."[93]

The Arizona Supreme Court considered the validity of court promulgated rules in *State v. Birmingham*[94] by looking to the substantive-procedural distinction. There an appeal was taken by the state from an order enjoining enforcement of a statute allowing the highway department to revoke drivers' licenses.[95] The trial court judge did not sign a written judgment but only an entry order making permanent the temporary restraining order. Rule 58 of the Arizona Rules of Civil Procedure requires all judgments to be in writing, signed by a judge, and provides that judgments are not effective until filed with the clerk.[96] The court held that despite noncompliance with

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> and registration has been denied, or, if the defendant is a registrant and his registration has been revoked or suspended, the county from which the records of the commission show him to be registered at the time the information is filed.

Legislation enacted by the Florida General Assembly in 1959 (but not applicable to pending cases) amends the statute to permit appeals only upon writ of certiorari. Laws of Florida 1959, ch. 59-197, § 4, at 364.

[90] FLA. APP. R. 4.1 states: "All appellate review of the rulings of any commission or board shall be by certiorari as provided by the Florida Appellate Rules."

[91] State v. Furen, 118 So. 2d 6, 12 (1960), *quoting* Poyser v. Minors, 7 Q.B.D. 329, 333 (1881). For a discussion of this English case, see Joinder & Miller, *supra* note 7, at 631-32.

[92] State v. Furen, 118 So. 2d 6, 12 (1960).

[93] *Id.*

[94] 95 Ariz. 310, 390 P.2d 103, *modified*, 96 Ariz. 109, 392 P.2d 775 (1964).

[95] Laws of Arizona 1959, ch. 142, § 2.

[96] Arizona Rule of Civil Procedure 58(a) provides:

> All judgments shall be in writing and signed by a judge or a court commissioner duly authorized to do so. The filing with the clerk of the judgment constitutes entry of such judgment, and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for taxing costs.

rule 58, it had jurisdiction to hear the appeal since the statute defining which judgments and orders were appealable controlled over rule 58.[97] The statute granting the right to appeal was labeled "substantive,"[98] although no definition of "substantive" or "procedural" was given.

However, on rehearing, the Arizona Supreme Court retreated from this holding.[99] The court said that although the right to appeal was substantive, "the manner in which the right may be exercised is subject to control through the use of procedural rules."[100] The statute designated those instances where a right to appeal existed and rule 58 described the manner in which a court must act to create an appealable order or judgment. The court thus concluded the rule was procedural and did not enlarge or diminish any substantive right of appeal given by the statute. The court held rule 58 valid, requiring compliance before an appeal could be taken.[101]

In its opinion on rehearing, the Arizona court used language very similar to that of the Ohio court in *Krause* in defining "substantive" and "procedural":

> Uniformly, the substantive law is that part of the law which creates, defines and regulates rights; whereas the adjective, remedial or procedural law is that which prescribes the method of enforcing the right or obtaining redress for its invasion. It is often said the adjective law pertains to and prescribes the practice, method, procedure or legal machinery by which the substantive law is enforced or made effective.[102]

D. *Ohio Adopts Course Similar to Florida Approach*

The Ohio Supreme Court had several different alternatives available when it decided *Hughes*. The court could have followed the federal approach, saying the statute was procedural and superseded by the rule. *Semel* would be authority for such an approach. The Ohio Supreme Court could have adopted the Arizona approach, holding that the right of appeal was substantive, but that the manner in which

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[97] State v. Birmingham, 95 Ariz. 310, 316, 390 P.2d 103, 107 (1964).

[98] *Id.*

[99] 96 Ariz. 109, 392 P.2d 775 (1964).

[100] *Id.* at 110, 392 P.2d at 776.

[101] *Id.* at 112-13, 392 P.2d at 777.

[102] *Id.* at 110, 392 P.2d at 776 (citations omitted).

the appeal would be taken was procedural. *Birmingham* would be legal precedent for such a course of action. Instead, the Ohio court adopted the approach taken by Florida, holding that the statute was substantive and therefore the conflicting rule was invalid. However, the court failed to cite any legal precedent to support its holding. By taking an expansive view of "substantive right", the court has narrowed the ambit of "procedure". By doing so, the court has also narrowed the scope of its rule making authority.

III. CHANGE OF JURISDICTION AS AN ADDITIONAL BASIS FOR *Hughes*

The majority in *Hughes* made several references to the change in the jurisdiction of appellate courts that would result if Ohio Appellate Rule 4 (B) were followed. According to the court, Revised Code §§ 2945.67 through 2945.70[103] grant jurisdiction to appellate courts to hear appeals by the prosecution in criminal cases.[104] The court intimated that the rule modified the jurisdiction granted by the statute: "App. R. 4 (B), in providing an appeal as of right by the prosecution, enlarges the statutory right of appeal provided by R. C. 2945.67 through 2945.70 and abridges the right of appellate courts to exercise their discretion in allowing such appeals."[105]

If the court were concerned that Ohio Appellate Rule 4 (B) changed the jurisdiction of appellate courts, it could have based its decision in *Hughes* on the inability of the court to expand or limit jurisdiction through its rule making power. Numerous federal and state courts have held that they have no power to change jurisdiction through court promulgated rules.[106]

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[103] OHIO REV. CODE §2945.68 is set out in note 38 *supra*. OHIO REV. CODE §2945.70 is set out in note 40 *supra*. OHIO REV. CODE ANN. § 2945.69 (Page 1975) reads as follows:

> The trial judge may appoint some competent attorney to argue the bill of exceptions against the prosecuting attorney, solicitor, or the attorney general under section 2945.68 of the Revised Code, and such appointee shall receive for his services a fee of not more than one hundred dollars, to be fixed by the judge and paid out of the treasury of the county in which the bill was taken. Such attorney shall file his brief against the prosecuting attorney, solicitor, or the attorney general within ten days after service upon him of the brief in support of said exceptions. The hearing of such cases shall have precedence of other business and such cases shall be continued upon the docket of the court of appeals or the supreme court until argued and submitted.

[104] State v. Hughes, 41 Ohio St. 2d 208, 210, 324 N.E.2d 731, 733 (1975).

[105] *Id.* at 211, 324 N.E.2d at 733.

[106] United States v. Sherwood, 312 U.S. 584 (1941), Sibbach v. Wilson & Co., 312 U.S. 1 (1941). *See* Annot., 110 A.L.R. 22 (1937), 158 A.L.R. 705 (1945); 7 J. MOORE, FEDERAL PRACTICE § 82.02 (2d ed. 1975).

Article IV, § 3 of the Ohio Constitution can be viewed to bar the courts' expansion of their jurisdiction through their rule making power. The relevant portion of that constitutional provision states that "[c]ourts of appeals shall have such jurisdiction as may be provided by law . . . ." Although Justice Herbert, in his dissent in *Hughes*, hypothesized that this provision could be construed to allow a change of jurisdiction via court made rules,[107] the section could more easily be construed to mean that courts of appeals have only such jurisdiction as granted by statutory enactment of the Ohio General Assembly.[108]

IV. THE EFFECT OF *Hughes* ON OTHER RULES

The decision in *Hughes*, viewed from either the substantive right or jurisdictional rationales, may have an impact on the validity of other court made rules. Two rules that could be directly affected are Ohio Criminal Rule 12 (J)[109] and Ohio Juvenile Rule 22(F),[110] both of which involve the state's right to appeal upon the granting of a motion to suppress evidence. These rules give the state an appeal as of right when, in addition to filing a notice of appeal, the prosecution certifies both that the appeal is not taken for the purpose of delay and that the granting of the motion has rendered the state's proof so weak that any reasonable possibility of effective prosecution is de-

[107] State v. Hughes, 41 Ohio St. 2d 208, 212, 324 N.E.2d 731, 734 (1975).

[108] *See* OHIO LEGISLATIVE SERVICE COMMISSION, STAFF RESEARCH REPORT NO. 75, PROBLEMS OF JUDICIAL ADMINISTRATION 72 (1965). The comments to the joint resolution proposed by the Study Committee on Judicial Administration indicate that jurisdiction "as established by law" is equivalent to "as established by act of the General Assembly."

[109] Ohio Criminal Rule 12 (J) reads in pertinent part as follows:

> The state may take an appeal as of right from the granting of a motion for the return of seized property, or from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that: (1) the appeal is not taken for the purpose of delay; and (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.
>
> Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be diligently prosecuted.

[110] Ohio Juvenile Rule 22 (F) states in part:

> In delinquency proceedings the state may take an appeal as of right from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that (1) the appeal is not taken for the purpose of delay and (2) the granting of the motion has rendered proof available to the state so weak in its entirety that any reasonable possibility of proving the complaint's allegations has been destroyed.

stroyed. However, Revised Code §§ 2945.67 through 2945.70 allow an appeal by the state only at the discretion of the appellate court.[111] These rules would seem to present the same issue as the court faced in *Hughes* and logically demand the same result, *i.e.*, a declaration of their invalidity. In cases where the Ohio Supreme Court has construed Ohio Criminal Rule 12 (J), no indication was given that the rule might be invalid.[112] But the issue of the validity of Criminal Rule 12(J) and Juvenile Rule 22 (F) has never been directly faced by the court.

If it is valid to assume that the change of jurisdiction by court made rule could have been an alternative ground for the holding in *Hughes*, then it would be possible to question the validity of a rule if it enlarged or restricted jurisdiction. Ohio Appellate Rule 2,[113] which abolishes appeals on questions of law and fact, could be attacked as impinging on the appellate jurisdiction of the court. Before the appellate rules were promulgated, at least ten sections of the Ohio Revised Code attempted to govern, to some degree, appeals on questions of law and fact.[114] The most important, Ohio Revised Code § 2501.02 (B), confers jurisdiction on the court of appeals to hear questions of law and fact in enumerated classes of actions, *e.g.*, actions seeking construction of a trust, the foreclosure of mortgages, specific performance of contracts, and injunctions.[115] After Appellate Rule 2

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[111] State v. Wallace, 43 Ohio St. 2d 1, 330 N.E.2d 697 (1975); State v. Hughes, 41 Ohio St. 2d 208, 324 N.E.2d 731 (1975).

[112] State v. Caltrider, 43 Ohio St. 2d 157, 331 N.E.2d 710 (1975); State v. Mitchell, 42 Ohio St. 2d 447, 329 N.E.2d 682 (1975). *But see* State v. Brown, 45 Ohio App. 2d 76, 79, 341 N.E.2d 325, 327 (1976) (concurring opinion), which applied the reasoning of *Hughes* to Criminal Rule 12 (J) and held that § 2945.68 through 2945.70, granting courts discretion as to appeals, controlled over the rule.

[113] Ohio Appellate Rule 2 states: "Appeals on questions of law and fact are abolished."

[114] OHIO REV. CODE ANN. §§ 1921.02 (appeals from county courts); 2101.42 (appeals from probate divisions); 2501.02(B) (classes of cases appealable on law and fact); 2505.01(C) (definition); 2505.03 (reference on appeals on questions of law and fact from judgments of county courts); 2505.05 (designations of type of appeal in notice of appeal); 2505.06 (bond in appeals on law and fact); 2505.21 (hearing de novo and procedure on appeal); 2505.23 (jurisdiction to entertain and transform to appeals on questions of law); 2505.33 (costs on appeals on law and fact). *See* 6 W. MILLIGAN, OHIO FORMS OF PLEADING AND PRACTICE CA2-1 (1975).

[115] OHIO REV. CODE ANN. § 2501.02(B) (Page Supp. 1975) states in part:

> Upon an appeal on questions of law and fact the court of appeals in cases arising in courts of record inferior to the court of appeals within the district, shall weigh the evidence and render such judgment or decree as the trial court could and should have rendered upon the original trial of the case, in the following classes of actions, seeking as a primary and paramount relief:
>
> . . .

became effective, the presumption was that appeals on questions of law and fact no longer existed, but all appeals had to be on questions of law. This rule can be viewed as taking away the power of the appellate courts granted by statute to resolve issues of fact. Although the Ohio Supreme Court has not ruled on its validity, Ohio Appellate Rule 2 was held valid by the Court of Appeals for Darke County. In *Shilt v. Irelan*,[116] the appellate court said the rule superseded Revised Code § 1921.02,[117] one of the sections allowing appeals on questions of law and fact from a judgment of a county court.

V. THE LEGISLATURE'S ROLE IN JUDICIAL RULE MAKING

The role in rule making assigned to the legislature varies greatly among the states.[118] In New Jersey the legislature has no formal role in fashioning court promulgated rules.[119] Any prior or subsequent conflicting statute is superseded by the rule. In Missouri, the rule making power of the court is limited by subject matter, *e.g.*, rules cannot change the law relating to juries or the right of appeal.[120] In addition, any rule may be repealed or amended by an enactment of the legislature limited to that purpose. In the federal system, proposed rules are submitted to Congress for examination and become effective if no action of disapproval is taken within ninety days.[121] However, Congress has the ultimate power over the practice and procedure of federal courts.[122]

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(3) The foreclosure of mortgages and marshalling of liens, including statutory liens.

. . .

(8) The quieting of title to property, the partition of property, and the registration of land titles. . . .

[116] 40 Ohio App. 2d 578, 321 N.E.2d 621 (1974).

[117] OHIO REV. CODE ANN. § 1921.02 (Page Supp. 1975) states, "[w]hen an appeal is taken from a judgment of a judge of a county court, the plaintiff in the action before the county court judge is the plaintiff in such court, and in all respects, the parties must proceed as if the action originally had been commenced in that court."

[118] Levin & Amsterdam, *supra* note 20, at 6 n.36; Note, *The Rule-Making Powers of the Illinois Supreme Court*, 1965 U. ILL. L.F. 903, 905-07 (1965).

[119] N.J. Const. art. VI, § 2¶3 directs the Supreme Court to make rules "governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts." In Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1950), the court interpreted "subject to law" to mean subject to substantive law and held that its rule making power was not subject to overriding legislation. For a stimulating discussion of this case, see Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951) and Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952).

[120] MO. CONST. art. V, § 5.

[121] 18 U.S.C. 3771 (1970); 28 U.S.C. 2072 (1970).

[122] Sibbach v. Wilson & Co., 312 U.S. 1 (1941). *See* C. CLARK, CODE PLEADING 44 n.129

In Ohio, the role of the legislature in the issuance of court rules is similar to that of Congress in the federal system in that the General Assembly has a veto power over the rules before they become effective. Article IV, § 5 (B) of the Ohio Constitution provides in part:

> [P]roposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. . . .

In Ohio, however, the legislative branch does not have the ultimate power over the practice and procedure of Ohio courts.[123] The responsibility for judicial procedure is placed, by the Ohio Constitution, with the Ohio Supreme Court, and the power of the General Assembly is limited to that of a veto.[124] Once a rule becomes effective, the General Assembly has no power to amend or repeal it and any conflicting statute is of no effect. Article IV, § 5 (B) of the Ohio Constituion says that "[a]ll laws in conflict with such [court promulgated] rules shall be of no further force or effect after such rules have taken effect."

In recognition of the supreme court's authority, the 108th General Assembly in 1970 repealed many statutes invalidated by the Ohio Rules of Civil Procedure.[125] However in 1975 the 111th General Assembly, in enacting a medical malpractice bill, attempted to change by statute what would be included in a complaint in a medical malpractice suit. The statute, Revised Code § 2307.42, requires such a complaint to contain

> (A) A statement of the facts constituting the cause of action in ordinary and concise language;

(2d ed. 1947).

[123] *See* Milligan & Pohlman, *supra* note 8, at 829.

[124] *Id.*

[125] 133 Ohio Laws 3017. Section 3 of the act provides:

That the taking effect of the Rules of Civil Procedure on July 1, 1970, is prima-facie evidence that the sections of the Revised Code to be repealed by Section 1 are in conflict with such rules and shall have no further force or effect, . . . unless a court shall determine that one of such sections, or some part thereof, has clearly not been superseded by such rules and that in the absence of such section or part thereof being effective, there would be no applicable standard of procedure prescribed by either statutory law or rule of court. The failure to repeal or amend any other section establishes no evidence concerning its conflict with such rules.

(B) A listing of all benefits of any kind paid or payable to the claimant from any source. . . ;
(C) A demand for judgment for the relief to which the pleader claims he is entitled, *except that the amount of relief in damages thereof shall not be stated.* [emphasis added].

The statute is in conflict with Ohio Civil Rule 8 (a) which requires a pleading to contain a "short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief to which he deems himself entitled." From the language of Art. IV, § 5 (B), it seems certain that the General Assembly cannot change a procedural matter by statute where a court promulgated rule is in force. In the procedural area, the rule controls over the statute. When faced with the conflict, the Ohio Supreme Court would almost certainly invalidate § 2307.42.

Many reasons support such a grant of rule making power to the court. The judiciary, as the branch of the government responsible for judicial administration in the public eye should have the authority to effectively regulate procedure.[126] Both the legislature and judiciary should be responsible for their own procedural operations.[127] The court is more familiar with its procedural problems and can take action to rectify them.[128]

Placing rule making authority in the court allows procedural requirements to be more flexible in application and more responsive to change.[129] The application of procedural statutes can become inflexible and result in injustice. While courts were bound by the statutes and action of the legislature was required to change them, rule making authority allows the courts to respond more quickly to procedural problems.

Finally, the legislature is subject to political pressures which may not have the efficient administration of justice as their objective.[130] Giving the court rule making power helps remove judicial procedure from a highly political arena.

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[126] *See* Levin & Amsterdam, *supra* note 20, at 10.

[127] *See* Pound, *The Rule-Making Power of Courts*, 12 A.B.A.J. 599, 601 (1926).

[128] *See* Levin & Amsterdam, *supra* note 20, at 11.

[129] Joiner & Miller, *supra* note 7, at 642-43; Pound, *supra* note 127, at 602.

[130] *See* Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 44 (1952).

VI. CONCLUSION

Although Ohio and other states have followed the trend of granting courts rule making authority, the scope of this authority has varied depending upon the definition of substance and procedure in each state. What is procedural in one state may be considered substantive in another. There could be a beneficial aspect to this variation: in jurisdictions where the legislature has power to override court made rules, procedure could be defined more broadly than in jurisdictions where the judiciary has no checks on its rule making authority.[131]

In *Hughes* the Ohio Supreme Court took a broader view of what was substantive than what the federal or some other state courts might have taken.[132] As a result of *Hughes*, prosecutors taking an appeal in a criminal case[133] will have to file a bill of exceptions rather than a notice of appeal. The appeal is a matter of discretion with the court, not as of right, as proposed by the rules.

Hughes can be viewed as the advent of a more cautious approach by the Ohio Supreme Court toward its rule making authority. The court should carefully scrutinize proposed rules to insure that they do not exceed the court's authority, since areas of legitimate legislative interest lie within the "twilight zone" between substance and procedure.[134] The Ohio Supreme Court should recognize that its rule making power is on a different level than that of the United States Supreme Court: the Congress can ultimately override any rule promulgated by the Court since the Court's rule making power is based on a legislative grant of authority.[135] In Ohio, the Ohio General Assembly cannot override any valid court made rule since the state court's

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[131] *See* Note, *The Rule-Making Powers of the Illinois Supreme Court*, 1965 U. ILL. L.F. 903, 904 (1965).

[132] *See* text beginning after note 102 *supra*.

[133] Appeal by the prosecution in a criminal case is rather limited. OHIO REVISED CODE ANN. § 2945.70 (Page 1975) permits a prosecutorial appeal for rulings of a trial court on a motion to quash, a plea in abatement, a demurrer, a motion to suppress evidence, or a motion in arrest of judgment. Ohio Criminal Rule 12 (A) abolishes all pleas not specifically enumerated; demurrers, a plea in abatement, and a motion to quash are abolished and replaced with a motion to dismiss. Ohio Criminal Rule 12 (J) allows the state to appeal a ruling on a motion to suppress evidence or a motion to return property. See discussion of Ohio Criminal Rule 12 (J) in text beginning at note 109 *supra*.

[134] Joiner & Miller, *supra* note 7 at 644-53 discuss specific phases of judicial administration and whether there is a legitimate legislative interest involved. *See also*, Peterson, *Rule Making in Colorado: An Unheralded Crisis in Procedural Reform*, 38 U. COLO. L. REV. 137, 163-64 (1966).

rule making authority derives from the Ohio Constitution, not the legislature.

On the other hand, the aforementioned reasons for allowing judicial rule making are sound.[136] The progress made in procedural reform under court made rules should continue. *Hughes*, the one self-confessed instance of rule making excess, must not be used to justify any further narrowing of the court's rule making authority.

The court in *State v. Wallace*[137] had the opportunity to retreat from its decision in *Hughes* but declined to do so. Instead, *Hughes* was reaffirmed and the procedural requirements of Appellate Rule 5 were applied to prosecutorial appeals. Thus, it appears that the *Hughes* decision and its effects will be with us for many years to come.

W. Glenn Forrester

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[135] *Cf.* Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928).

[136] *See* text beginning after note 126 *supra*.

[137] 43 Ohio St. 2d 1, 330 N.E.2d 697 (1975).